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 CREDITORS ADJUSTMENT BUREAU, INC.  
 Our File No. 77906

UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

CREDITORS ADJUSTMENT BUREAU, )	CASE NO. C08-01431 MMC
INC., A CALIFORNIA CORPORATION )	
Plaintiff, )	Assigned to: Hon. Maxine
v. )	M. Chesney, Dept. 7
M. ROTHMAN & CO., INC. )	OPPOSITION TO DEFENDANT'S
Defendant. )	MOTION TO DISMISS OR
_____ )	TRANSFER
	DATE: MAY 30, 2008
	TIME: 9:00 A.M.
	DEPT: 7

1.

PLAINTIFF'S ASSIGNOR IS SEEKING TO SET ASIDE

THE JUDGMENT IN THE NEW JERSEY ACTION

Defendant argues that the instant matter should be dismissed on the grounds that the claims were res judicata as a result of default judgment entered on April 1, 2008 in favor of M. Rothman & Co., Inc. and against Hanspree in an action brought by M. Rothman & Co., Inc. in New Jersey.

However, Plaintiff's assignor has filed a motion to vacate the New Jersey judgment and to allow Plaintiff's assignor to file an answer and counterclaim. Said motion is scheduled for May 23,

2008. Once granted, Plaintiff's assignor will immediately move the New Jersey court to compel arbitration in Alameda County, California pursuant to the express terms of the contract entered into between Plaintiff's Assignor and M. Rothman & Co.<sup>1</sup>

However, in the unlikely event that the New Jersey court denies Plaintiff's assignor's motion to vacate the New Jersey judgment, Plaintiff submits that the within action should still be stayed pending the exhaustion by Plaintiff's assignor of the reconsideration and appeals processes in the New Jersey courts.

2.

IT IS IMPOSSIBLE TO ASCERTAIN FROM

DEFENDANT'S CONTRACT ACTION

WHETHER BOTH ACTIONS RAISE THE SAME CLAIM

As stated in Weil & Brown, Civil Procedure Before Trial at ¶6:132:

"A written contract may be pleaded either in haec verba (word for word) or generally 'according to its legal intendment and effect' (e.g., 'defendant agreed to sell the described property to Plaintiff for \$100,000'). [Scolinos v. Kolts (1995) 37 Cal.App.4th 635, 640, 44 Cal.Rptr.2d 31, 34]."

However, the breach of contract cause of action contained in Defendant's New Jersey complaint (attached as Exhibit "3" to Defendant's Request for Judicial Notice in support of its motion)

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<sup>1</sup> New Jersey courts, like California courts, favor trials on the merits and are generally liberal in granting motions to set aside default judgments.

1 fails to accomplish even these rudimentary requirements.  
2 Defendant's complaint and judgment paperwork alleges no specific  
3 contractual terms and fails to attach any contract. The  
4 complaint is so vague and ambiguous that it cannot be res  
5 judicata as to the contract claims alleged by Plaintiff in this  
6 case.

7 Defendant's claims of res judicata should therefore be  
8 disregarded.

9 3.

10 THE CASE SHOULD BE STAYED PENDING

11 COMPLETION OF ARBITRATION

12 Plaintiff has filed a motion to compel arbitration and  
13 to stay or dismiss the within matter pending completion of  
14 arbitration, to be heard concurrently herewith. Plaintiff  
15 respectfully submits that this Court should decline to entertain  
16 Defendant's motion to dismiss as this case must proceed to  
17 binding arbitration for the reasons set forth herein.

18 As set forth hereinabove, the contract entered into between  
19 Plaintiff's assignor and M. Rothman & Co. and sued upon herein  
20 contains the following arbitration clause at ¶10.C.:

21 "The parties will endeavor to settle  
22 amicably by mutual discussions any claim,  
23 dispute or controversy arising out of or in  
24 connection with or relating to this  
25 Agreement or the breach or alleged breach  
26 thereof. Failing such amicable settlement,  
27 any remaining claim, disputes or controversy  
28 will be submitted by the parties to a

1           binding arbitration by a mutually agreed  
2           upon arbitrator of the American Arbitration  
3           Association in the Alameda County, State of  
4           California, United States of America under  
5           the commercial rules then in effect for that  
6           Association, except as provided herein. The  
7           parties will be entitled to discovery as  
8           provided in Sections 283.05 and 1283.1 of  
9           the Code of Civil Procedure of the State of  
10          California or any successor provision,  
11          whether or not the California Arbitration  
12          Act is deemed to apply to the arbitration.  
13          The award rendered by the arbitrator will  
14          include costs of arbitration, reasonable  
15          attorneys' fees, and reasonable costs for  
16          expert and other witnesses, and judgment on  
17          such award may be entered in any court  
18          having jurisdiction thereof." [Emphasis  
19          added.]

20               Based on the contract provisions cited hereinabove,  
21          Plaintiff submits that this case should be stayed or dismissed  
22          without prejudice, with each side bearing its own fees and costs,  
23          pending completion of arbitration.

24               A party to an arbitration agreement may seek a court order  
25          compelling the parties to arbitrate a dispute covered by the  
26          agreement. California Code of Civil Procedure §1281.2. A party  
27          may seek a stay of pending litigation either by itself or in  
28          conjunction with a petition to compel contractual arbitration.

1 California Code of Civil Procedure Section 1281.4; Twentieth  
2 Century Fox Film Corp v. Superior Court (2000) 79 Cal.App.4th  
3 188, 192, 93 Cal.Rptr.2d 896, 898.

4 If the arbitration award is not voluntarily paid, the  
5 prevailing party in the arbitration proceeding may file a motion  
6 to confirm the arbitration award and to enter a judgment thereon.  
7 California Code of Civil Procedure §1286. In this regard,  
8 granting a stay does not divest the court of jurisdiction. The  
9 court retains jurisdiction to determine any subsequent petition  
10 involving the same agreement to arbitrate and the same  
11 controversy. California Code of Civil Procedure §1292.6.

12 The Supreme Court has consistently upheld the enforceability  
13 of pre-dispute arbitration agreements. Shearson/Am.Express v.  
14 McMahon (1987) 482 U.S. 220, 225-26.

15 Under both Federal and California law, the mere filing of a  
16 lawsuit does not waive contractual arbitration rights. Doers v.  
17 Golden Gate Bridge etc. Dist. (1979) 23 Cal.3d 180, 188, 151 Cal.  
18 Rptr.837. Further, participation in a lawsuit for breach of a  
19 contract, standing alone, does not constitute a waiver. "'Mere  
20 delay in seeking a stay of the proceedings without some resultant  
21 prejudice to a party [citation], cannot carry the day.'" Keating  
22 v. Superior Court (1982) 31 Cal.3d 584, 605-606, 183 Cal.Rptr.  
23 360,373.

24 In Doers v. Golden Gate Bridge etc. Dist. (1979) 23 Cal.3d  
25 180, 151 Cal.Rptr. 837, the Supreme Court concluded that the  
26 filing of a lawsuit on an arbitrable claim did not waive the  
27 right to arbitrate. In that case, an employee had previously sued  
28 the employer in federal court, but the action was dismissed for

1 lack of subject matter jurisdiction. When the employee later  
2 sought to compel arbitration of the claim, the employer opposed  
3 it, contending the plaintiff had waived the right to arbitrate.

4 The Supreme Court disagreed: "We hold that the mere filing  
5 of a lawsuit does not constitute a waiver of the right to  
6 arbitrate." Id. at p. 183. The court noted:

7 "At the outset, we recognize that several  
8 recent Court of Appeal cases have either  
9 stated or held that a party waives his  
10 contractual arbitration right by merely  
11 filing a lawsuit. [Citations.] However, an  
12 examination of the case authorities relied  
13 upon by these recent cases reveals [] only  
14 that waiver occurs when the merits of the  
15 dispute have been litigated by the parties."  
16 Id. at 185-186 ... "[I]t is the judicial  
17 litigation of the merits of arbitrable  
18 issues which waives a party's right to  
19 arbitration. ... Because the arbitrable  
20 issues in the instant action were never  
21 litigated by the parties in the federal  
22 court, we find that appellant Doers did not  
23 waive his contractual arbitration rights."  
24 Id. at p. 188.; See also, Kalai v. Gray  
25 (2003)109 Cal.App.4th 768, 135 Cal.Rptr.2d  
26 449.

27 Finally, the law strongly favors arbitration and any claim  
28 of waiver is closely scrutinized. Gavlik Construction Co. v. H.F.

1 Campbell Co. (3rd Cir. 1975) 526 F.2d 777, 783; Seidman & Seidman  
 2 v. Wolfson (1975) 50 Cal.App.3d 826, 835, 123 Cal.Rptr.873.  
 3 Moreover, the burden of proof is "heavy" and rests on the party  
 4 seeking to establish waiver. Martin Marietta Aluminum, Inc. v.  
 5 General Electric Co. (9th Cir. 1978) 586 F.2d 143, 146; General  
 6 Guar. Ins. Co. v. New Orleans General Agency, Inc. (5th Cir.  
 7 1970)427 F.2d 924, 929, fn.5.

8 4.

9 PROPER JURISDICTION IS IN CALIFORNIA

10 AND CALIFORNIA LAW APPLIES

11 The contract in question clearly and conspicuously sets  
 12 forth the forum selection clause under paragraph 10.C, stating  
 13 that all disputes would be submitted for resolution in Alameda  
 14 County, State of California. Whether defendant read this clause  
 15 is of no import. It is enough that the defendant had an  
 16 opportunity to read the clause before executing the contract.  
 17 Deiro v. American Airlines, Inc. (9th Cir. 1987) 816 F.2d 1360,  
 18 1364.

19 California courts may exercise personal jurisdiction over a  
 20 nonresident who has consented in advance to such jurisdiction,  
 21 even in the absence of other "contacts" with such person.  
 22 National Equipment Rental LTD v. Szukhent (1964) 375 US 311, 315-  
 23 316, 84 S.Ct. 411, 414. Indeed, forum selection clauses may apply  
 24 to both contract and tort claims. Cal State Business Products &  
 25 Services, Inc. v. Ricoh (1993) 12 Cal.App.4th 1666, 1677, 16  
 26 Cal.Rptr.2d 417, 423.

27 Forum selection clauses will be given effect unless it is  
 28 shown by the resisting party that enforcement of such a clause

7 Opposition to Defendant's  
Motion to Dismiss

1 would be unreasonable. Smith, Valentino & Smith, Inc. v.  
2 Superior Court (1976) 17 Cal.3d 491, 497, 131 Cal.Rptr. 374, 377.  
3 A forum selection clause is prima facie valid and will be  
4 enforced unless the resisting party meets the "heavy burden" of  
5 proving enforcement would be unreasonable under the circumstances  
6 of the case. Bancomer v. Superior Court (1996) 44 Cal.App.4th  
7 1450, 1457, 52 Cal.Rptr.2d 435, 439.

8 This requires the resisting party to prove that litigating  
9 in the designated forum would be so gravely inconvenient that it  
10 would effectively deny them their day in court. The Bremen v.  
11 Zapata Off Shore Co. (1972) 407 US 1, 18, 92 S.Ct. 1907, 1917;  
12 CQL Original Products, Inc. v. National Hockey League Players  
13 Ass'n (1995) 39 Cal.App.4th 1347, 1354, 46 Cal.Rptr.2d 412, 416  
14 [resisting party must show the forum selected "would be  
15 unavailable or unable to accomplish substantial justice"].

16 Furthermore, the test is not whether the provision was  
17 negotiated but whether it is fundamentally unfair. As stated in  
18 Cal State Business Products & Services, Inc., supra:

19 "The fact that a forum selection clause is  
20 contained in a contract of adhesion and was  
21 not the subject of bargaining does not  
22 defeat enforcement as a matter of law, where  
23 there is no evidence of unfair use of  
24 superior power to impose a contract upon the  
25 other party and where the covenant is within  
26 the reasonable expectations of the party  
27 against whom it is being enforced." 12  
28 Cal.App.4th at 1679, 16 Cal.Rptr.2d at 425.

The chosen forum need have only a "reasonable" relationship to the parties or their dispute. It be not be related to the parties domicile. Indeed, the parties may choose a neutral forum with expertise in the subject matter. The Bremen, supra, 407 US at 17, 92 S.Ct. at 1917.

Plaintiff submits that the case of COL Original Products, Inc., supra, is directly on point and controlling. In that matter, a licensing agreement required the licensee to litigate any claims against the licensor in Toronto, Canada, where licensor had its principal office. The choice of forum provision was reasonable because it protected the licensor from being confronted by a myriad of different state and national forums. It was immaterial that the licensee could not negotiate to alter this provision; the forum selection clause was part of the price to be paid for dealing with the licensor. 39 Cal.App.4th at 1355, 46 Cal.Rptr.2d at 417.

In this case, the forum selection clause is certainly enforceable for numerous reasons. Plaintiff's assignor, Hannspree California, Inc., maintains its principal place of business in California. The choice of forum provision operates to protect Hanspree from being confronted by a "myriad of different state and national forums", in connection with the goods and services it provides to distributors throughout the nation.

All communication in connection with the execution and compliance with the contractual terms comes from California including, but not limited to, invoicing, dispute resolution, billing, etc. All sums due and owing under the contract to

1 Hannspree are payable to its office in California. Any witnesses  
2 that would attend a trial would also come from Hannspree's  
3 office in California.

4 5.

5 CONCLUSION

6 Based on the foregoing, plaintiff respectfully requests that  
7 Defendant's motion to dismiss be denied, and that the Court stay  
8 this action pending completion of arbitration, or, in the  
9 alternative, to dismiss this action without prejudice, with each  
10 side bearing its own costs and fees, so that the matter may be  
11 arbitrated in California in compliance with the parties' written  
12 agreement.

13 Dated: May 7, 2008

LAW OFFICES OF KENNETH J. FREED

14  
15 BY: 

KENNETH J. FREED, ESQ.  
Attorneys for Plaintiff,  
CREDITORS ADJUSTMENT BUREAU, INC.

DECLARATION OF SERVICE BY FAX  
U.S.D.C. NORTHERN DISTRICT OF CALIFORNIA LOCAL RULE 5-5(a)(1)  
CALIFORNIA RULES OF COURT, RULE 2008

The undersigned certifies and declares as follows:

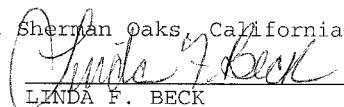
- (1) At the time of the facsimile transmission described below I was at least 18 years of age and not a party to this legal proceeding.
- (2) On May 9, 2008 at 2:25, a.m. (p.m.), I transmitted from a facsimile machine whose telephone number is (818) 990-1047 the following document:

OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR TRANSFER to CHASSMAN & SEELIG, LLP, MARK B. CHASSMAN, ESQ., RHONDA E. KALEY, ESQ., attorneys for defendant, whose facsimile transmission number is (213) 626-5111.

The above-described transmission was reported as complete without error by a transmission report issued by the facsimile transmission machine upon which the said transmission was made immediately following the transmission. A true and correct copy of the said transmission report is attached hereto and incorporated herein by this reference.

I CERTIFY AND DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF CALIFORNIA AND THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED on May 9, 2008, at Sherman Oaks, California.

  
LINDA F. BECK

TRANSMISSION VERIFICATION REPORT

TIME : 05/09/2008 13:31  
 NAME : KENNETH J FREED  
 FAX : 8189901047  
 TEL : 8189900888  
 SER.# : BROE6J464855

DATE, TIME 05/09 13:28  
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